Office-Supreme Court, U.S.
FILED
FEB 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1202

In the Supreme Court of the United States

OCTOBER TERM, 1982

STEERE TANK LINES, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Interstate Commerce Commission granting an application for limited motor common carrier operating authority was supported by substantial evidence and was otherwise consistent with Section 5(a)(3) of the Motor Carrier Act of 1980, 49 U.S.C. (Supp. IV) 10922(b).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 6

James Wilkett, Extension - Oklahoma and Texas, No. MC-121794 (Sub-No. 7) (ICC Jan. 25, 1983) 4

Statutes:

Interstate Commerce Act, 49 U.S.C. (Supp. II) 10922(a) 2

Motor Carrier Act of 1980:

Section 5(a), 49 U.S.C. (Supp. IV) 10922 2

Section 5(a)(3), 49 U.S.C. (Supp. IV) 10922(b)(1) 3

Section 5(a)(3), 49 U.S.C. (Supp. IV) 10922(b)(1)(B) 2

Miscellaneous:

H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. (1980) 2, 5

47 Fed. Reg. 49558 (1982) 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9a-16a) is reported at 687 F.2d 104. The order of the Interstate Commerce Commission denying appeal (Pet. App. 6a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1982. On December 10, 1982, Justice White extended the time within which to file a petition for a writ of certiorari to January 17, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In order to promote competition among motor carriers, Congress, in Section 5(a) of the Motor Carrier Act of 1980, 49 U.S.C. (Supp. IV) 10922, modified the requirements for obtaining authorizations for service by motor common carriers. See H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 3, 12 (1980). Congress retained the preexisting requirement that the person seeking a certificate must be "fit, willing and able" to provide designated service, but eliminated the need for the applicant to show that the transportation is "required by the public convenience and necessity." [1] Instead, Congress directed the Commission to grant an application if it finds, on the basis of the applicant's evidence, that the proposed service "will serve a useful public purpose, responsive to a public demand or need," unless the Commission finds, on the basis of evidence presented by someone opposing the application, that the certificate would be "inconsistent with the public convenience and necessity." 49 U.S.C. (Supp. IV) 10922(b)(1)(B). Thus, Congress significantly altered the relative burdens of proof imposed on applicants and protestants in motor common carrier certification proceedings.

2. In January 1981, Petroleum Transport, Inc., a motor carrier operating 15 pieces of equipment exclusively within Texas, applied to the ICC for authorization to carry petroleum and petroleum products between points in Texas and

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[1] Prior to 1980, the Interstate Commerce Act, 49 U.S.C. (Supp. II) 10922(a), provided that the Commission "shall issue" a motor common carrier certificate if the Commission finds:

> (1) the person is fit, willing and able—(A) to provide the transportation to be authorized by the certificate; and (B) to comply with this subtitle and regulations of the Commission; and
>
> (2) the transportation to be provided under the certificate is or will be required by the public convenience and necessity.

New Mexico (Pet. App. 10a, 13a). The application was opposed only by petitioner, a substantially larger motor carrier authorized to perform similar services between the same states.

The Commission's Review Board found that Petroleum Transport's proposed service would "serve a useful public purpose, responsive to a public demand or need" (Pet. App. 2a). The Board noted that four petroleum shippers supported the application because existing service was inadequate, particularly during peak shipping periods (*id.* at 1a). The Board also found that petitioner had not shown in any way that Petroleum Transport's entry into the market would materially jeopardize petitioner's systemwide operations or be inconsistent with the public convenience and necessity (*id.* at 2a). Accordingly, the Board granted the application (*ibid.*).

Both an appellate division of the Commission and the full Commission denied petitioner's requests for an oral hearing and appeal, finding that no material facts were in dispute and that the decision of the Board was "in accordance with the evidence and the applicable law" (Pet. App. 4a, 6a).

3. The court of appeals affirmed (Pet. App. 9a-16a). Reviewing the relevant requirements of Section 5(a)(3) of the Motor Carrier Act of 1980, 49 U.S.C. (Supp. IV) 10922(b)(1), the court found that petitioner's arguments that Petroleum Transport was "unfit" to perform the proposed service, or that Petroleum Transport's entry would be inconsistent with the public convenience and necessity, were insubstantial (Pet. App. 13a). The court also found that the documentary testimony of four shippers, showing exactly how many shipments per week or month they expected to tender to the new entrant, constituted substantial evidence to support a finding that the "proposed service will serve 'a useful public purpose, responsive to a public

demand or need' " (*id.* at 13a, 14a). The court also held that the Commission's denial of petitioner's request for an oral hearing was permissible because the contested evidence was "immaterial" and thus an oral hearing "could serve no useful purpose" (Pet. App. 14a).

ARGUMENT

1. Petitioner attempts to characterize the issue in this case as an important question of statutory interpretation, arguing (Pet. 14-18) that Congress did not intend the Commission to authorize competing motor carrier services on the basis established here. In fact, the issue here is simply whether the evidence was sufficient to support the Commission's findings that the requirements of the Motor Carrier Act of 1980 were satisfied. The decision of the court of appeals that there was substantial evidence to support the Commission's order allowing a single common carrier to provide limited service between two states was clearly correct and does not warrant further review by this Court.

Contrary to petitioner's assertion (Pet. 22), the evidence regarding shipper demand for Petroleum Transport's service was not impermissibly vague; all four shippers gave specific testimony as to their intended use of the new service, including exact numbers of shipments per month or week (Pet. App. 14a). This testimony, given under oath,[2] is

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[2]There is no substance to petitioner's claim (Pet. 23) that the evidence in this case (and in all application proceedings) is unreliable because "[t]he Commission is now refusing to set any motor carrier of property entry application for oral hearing" and "[t]he knowledge that no application will be set for oral hearing and no shipper ever cross-examined inevitably leads to careless testimony." Written testimony submitted in Commission proceedings in which no oral hearing is held is sworn testimony to which the usual perjury penalties apply. See 47 Fed. Reg. 49558 (1982). Moreover, the Commission holds oral hearings on applications of motor carriers of property when, unlike in this case, material facts are in dispute. See 47 Fed. Reg. 49558 (1982). See, *e.g.*, *James Wilkett, Extension - Oklahoma and Texas*, No. MC-121794 (Sub-No. 7) (ICC Jan. 25, 1983).

just the kind of evidence that Congress recognized as "the most effective evidence" of demand or need (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 14 (1980)). It amply satisfies Congress' desire that the applicant "come forward with *some evidence* of a public demand or need for the service." *Id.* at 14 (emphasis added). Nothing in the statute suggests that Congress intended that shippers be obliged to specify why they would use the proposed service; it is sufficient that they would use it and that therefore there is a demand for it. Only if the protestant can demonstrate that there is serious reason to doubt the veracity of this testimony would there be any reason for the Commission to inquire further.

2. Petitioner contends (Pet. 18-19) that the court of appeals did not affirm the Commission's decision on the basis the agency articulated. The court in fact affirmed because there was substantial evidence to support each of the statutory findings made by the Commission—that Petroleum Transport showed that it was "fit, willing, and able" to perform the proposed service, that its service will serve a useful public purpose,[3] and that petitioner failed to show that the service would be inconsistent with the public convenience and necessity (Pet. App. 11a, 14a). Accordingly, the court evaluated the decision under precisely the same criteria as the Commission.

The court of appeals did criticize the "unfortunate emphasis in the Commission's order on the inadequacy of existing common carrier services" (Pet. App. 13a-14a). The

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[3]Contrary to petitioner's suggestion (Pet. 8-9), the court of appeals did not "invent" any new test by which to judge the need for new service. Rather, the court simply summarized the evidence upon which the Commission determined that the new service would serve a useful public purpose. That the court in summarizing the evidence did not use the identical words the Commission used is hardly a basis for concluding that the court adopted a new "test" or standard.

court added, however, that "[t]he Commission's order unmistakably, if indirectly, indicates that it was aware of and considered" the evidence that the shippers would use the service if it were available (*id.* at 14a). That conclusion is fully consistent with this Court's admonition that a reviewing court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286 (1974).[4] Accordingly, further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1983

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[4]Petitioner's argument that the Commission's focus on need and the court's focus on demand involve fundamentally different grounds for decision ignores the interrelationship between the two terms. The very fact that these shippers can testify that they would demand specific service if it were available is essentially a statement that their present needs are not fully satisfied.

DOJ-1983-02